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Daniel Waxman
University of Kentucky

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Auctioning Off Integrity: The Legitimacy of Seller–Rebate Agreements in the Thoroughbred Auction Context

Daniel Waxman¹

Suppose an agent with his principal's knowledge, makes a deal with a seller, let's assume he guarantees seller \$300,000 for Hip No. 123, but if there is anything over \$300,000, the overage will be split 50/50. The horse remains owned by the seller, all risk of loss stays with the seller until the auction sale, but buyer and seller in this instance have arranged for a minimum value of the horse. Is there any real difference between this and the seller setting a reserve?² [Is this a permissible practice?]

THE above hypothetical was posed by Mr. William T. Bishop III³ at the 2006 National Equine Law Conference in Lexington, Kentucky. His presentation, entitled “The Games People Play,” outlined a number of “questionable” practices that are believed to occur with some regularity in public and private equine transactions. The introduction of this particular fact pattern, hereinafter referred to as a “seller–rebate agreement,”⁴ generated considerable debate among the conference attendees. “In a room full of lawyers, the responses [to this agreement] ranged from characterizing the deal as just good business practice, to price–fixing and fraud.”⁵ This marked divergence of opinion was not the result of conflicting judicial

¹ J.D. expected 2008, University of Kentucky College of Law; B.A. 2004, McMaster University (Ontario, Canada).

² William T. Bishop III, *What Happens Commonly in Equine Transactions*, UK/CLE NATIONAL CONFERENCE ON EQUINE LAW § E(b)–3 (2006).

³ Mr. Bishop is a partner in the law firm of Stoll Keenon Ogden PLLC, where he serves as the chairman of the firm's Equine Practice Group. He serves as general counsel for numerous important thoroughbred businesses, including the Keeneland Association, Claiborne Farm, and the Jockey Club. A complete biography is available at <http://www.skofirm.com/attorney.php?attId=337> (last visited July 2, 2007).

⁴ For the purposes of this paper, the term “seller–rebate agreement” will be the title given to any arrangement in which a seller at an auction sale agrees to discount a percentage of the final bid or provide a fee as consideration for a bidder participating in the auction above a set price. All examples provided in this paper will assume away any potential impropriety by agents of the seller or buyer in order to focus on the legality of the agreement itself, rather than extraneous external matters which are better dealt with by the law of agency.

⁵ Mary Meehan, *Horse Sales Critic Wants More Legislation: Jess Jackson Backs Licensing, Disclosure*, LEXINGTON HERALD LEADER, May 4, 2006, at A1.

decisions on the matter, nor the moral failings of individual participants, but was instead the result of the absence of a definitive judicial ruling on the legality of seller–rebate agreements.⁶ The purpose of this article then is to distill a clear rule from this morass; to determine the propriety of seller–rebate agreements in the thoroughbred auction context, given the application of the general principles of contract law and the more specific nature of the thoroughbred horse industry.

To better achieve this goal this article has been divided into three separate, yet interdependent, sections. The first section introduces the reader to the importance of auctions in the thoroughbred industry and explains the history of (and potential for) abusive bidding practices in such sales.⁷ The second section outlines the particular law of auctions, focusing on the limited, albeit significant, precedents relating specifically to seller–rebate agreements.⁸ The final section consists of a policy analysis of seller–rebate agreements using the general law of auctions as a template for comparison, balanced against the mores of the thoroughbred auction market.⁹ Finally, the author concludes that the utilization of seller–rebate agreements in the Commonwealth of Kentucky *may* result in the imposition of civil liability, but that the thoroughbred industry, (in concert with the state legislature), should attempt to codify such impropriety so as to assure the aforementioned result.

I. AUCTIONS & THE THOROUGHBRED INDUSTRY

A. *Basics of Thoroughbred Valuation*

The economic structure of the thoroughbred industry, in its most basic form, is founded upon the ability of a horse to run for more or less a mile and to do so faster than any other horse of its age or gender.¹⁰ A horse race, in purely economic terms (absent considerations of wagering and entertainment value), is merely an objective methodology for determining the respective abilities, and thus the respective valuations, of a representative sample of the thoroughbred horse population.¹¹ The results of this analysis (i.e. the

6 See *infra* notes 87–96 and accompanying text.

7 See *infra* notes 10–49 and accompanying text.

8 See *infra* notes 50–96 and accompanying text.

9 See *infra* notes 97–144 and accompanying text.

10 See Robert S. Miller, *America Singing: The Role of Custom and Usage in the Thoroughbred Horse Business*, 74 Ky. L.J. 781, 783 (1985).

11 The foregoing economic theory is the work of the author based on his experience as a buyer and seller of standardbred horses and his continued observation of the thoroughbred market. It is not the result of a scientific analysis, nor the work of a distinguished economist—the latter of which is probably sufficiently clear without this proviso. The concepts are loosely based, however, on the ideas of Robert Miller cited in future footnotes. See *generally*

results of the individual race and, perhaps more importantly, the events which transpire to determine that outcome)¹² serve to place values or rankings on the horses within that sample and a cumulative value on the sample as a whole. The cumulative value of each individual race is then weighted against the sum of all such races to provide for a more complete matrix of the value of an individual horse extracted from its initial sample size.¹³ The incentive for the owner of a thoroughbred horse to engage in this contest of values is quite simple: at the conclusion of each race the first five horses to cross the finish line are awarded the prize money offered by the racetrack¹⁴—a figure which may be as high as six million dollars for a single race.¹⁵ The size of the purse offered is typically representative of the caliber of the field of horses; the caliber of the field, as indicated previously, is determined according to the results of previous races. The more impressively a horse performs in any given race, the more opportunity he has to race for greater fiscal returns in the future. Thus, the inherently cyclical nature of this exercise. Taken to its ultimate conclusion then, it is the ability of any given horse to obtain purse winnings that establishes its value, and indirectly, the value of all registered thoroughbreds, regardless of their current racing status. Stallions¹⁶ and broodmares,¹⁷ oftentimes valued in the tens of millions of dollars, have the sole function of producing

id. at 783–86.

¹² The outcome of a horse race is subject to a number of external factors which may override the true ability of a given horse in a particular race. A horse who finishes behind another may very well have raced in a more impressive manner than the eventual race winner. Such factors include the difficulty of the trip, the fractional times of the race, the weight carried by the horse, the post–position, etc. See *e.g.*, *Winning Techniques*, CIX THE DAILY RACING FORM XXX (Spring 2004), available at http://www.drf.com/row/fan_ed/winning-techniques-2004.pdf.

¹³ This concept is akin to that of the thoroughbred graded stakes system established by the Thoroughbred Owners and Breeders Association in 1973. The purpose of the system is “to provide owners and breeders of thoroughbred horses a reliable guide to the relative quality of thoroughbred bloodstock by identifying those U.S. races whose recent renewals have consistently attracted the highest quality competition.” Thoroughbred Owners and Breeders Association, *Member’s Guide 2007: An Explanation of the American Graded Stakes Process*, <http://www.toba.org/graded-stakes> (last visited June 30, 2007).

¹⁴ Purse funds are primarily generated via the track’s established takeout percentage on on–site and off–site pari–mutuel wagering, but may be supplemented in some cases by nomination fees, revenues from alternative gaming sources (in states with race–based video lottery terminals), sponsorship deals, or state breeding incentives.

¹⁵ The \$6 million Dubai World Cup is the world’s richest horse race. The race is run at the Nad al Sheba Racecourse in the United Emirates of Dubai and was won in 2007 by Invador. See *Dubai World Cup: The World’s Richest Race Meeting*, http://dubairacingclub.com/dubaiworldcup/index.php?page_id=6 (last visited August 8, 2007).

¹⁶ A stallion (or sire) is a male horse used for breeding. *THE BLOOD–HORSE AUTHORITATIVE GUIDE TO AUCTIONS* 103 (Blood–Horse Publications 2004).

¹⁷ A Broodmare is a mare (female horse) that has been bred and is used for breeding purposes. *Id.* at 99.

offspring that are able to win these purses.¹⁸ The value of these offspring, in turn, is based on their potential racing success (i.e., the ability to win purses) and the probability of their breeding future generations who share these very same abilities.¹⁹ It is a highly speculative endeavor, but one founded on a dreadfully simple equation: speed = dollars.

The marketplace in which these economic transactions occur is somewhat unique in that it has been effectively bifurcated into a private and a public component.²⁰ While private sales represent a significant contribution to the overall thoroughbred economy, it is the public auction market that is the true barometer of an individual thoroughbred's worth.²¹ Thoroughbred auction sales provide a focus for the industry, a sort of state of the union type quality that simply cannot be replicated by a matrix of one-on-one transactions. Their significance is not merely economic (although that is their primary function), it is inherently social.²² Auction sales, however large or small, have a public function that deeply affects all segments of the thoroughbred economy.²³

B. Auctions

The annual thoroughbred auction market in the United States is comprised of the sale and purchase of approximately 20,000 horses at 150 individual sales for gross revenues in excess of 1.13 billion dollars.²⁴ The most famous (and most monetarily significant) of these auctions are those conducted by the Keeneland Association²⁵ in Lexington, Kentucky, and by Fasig-Tipton

¹⁸ Miller, *America Singing*, *supra* note 10, at 783.

¹⁹ *Id.* at 784.

²⁰ Robert S. Miller, *The Sale of Horses and Horse Interests: A Transactional Approach*, 78 Ky. L.J. 517, 544 (1990).

²¹ *Id.* at 544-45.

²² According to Charles W. Smith, "auctions are social processes capable of defining and resolving inherently ambiguous situations" and "are manifestly concerned with generating and maintaining social relations and values and [providing] a means for understanding the role [they] play in what might appear to be purely economic transactions." CHARLES W. SMITH, AUCTIONS: THE SOCIAL CONSTRUCTION OF VALUE 3.14 (University of California Press 1989). One need only witness the pomp and circumstance of the Keeneland September Yearling Sale to gain a true appreciation for the above passage.

²³ Miller, *America Singing*, *supra* note 10, at 535.

²⁴ DEAN, DORTON & FORD, P.S.C., 2005: EQUINE BUSINESS YEAR IN REVIEW 4-5, *available at* <http://www.ddfky.com/DDF-EBYR05.pdf> (last visited August 8, 2007). Thoroughbred horses are generally auctioned according to their age and purpose. Yearling sales constitute the lion's share of the auction market with total sales of \$553,928,546 per year (or \$54,910 per yearling), followed by broodmares at \$264,017,792 (a \$54,572 average), two-year-olds at \$190,888,903 (a \$60,851 average), and weanlings at \$79,370,644 (a \$43,716 average). THE JOCKEY CLUB, 2006 FACT BOOK: A GUIDE TO THE THOROUGHBRED INDUSTRY IN NORTH AMERICA 22, <http://www.jockeyclub.com/factbook.asp> (last visited March 12, 2007).

²⁵ See Keeneland Sales, <http://www.keeneland.com/livesales> (last visited June 30, 2007).

Inc.,²⁶ which conducts sales at numerous locations, but holds its major select auctions²⁷ in Saratoga, New York, and Lexington, Kentucky.²⁸ Other major American auctions are held by the Ocala Breeders' Sales Company in Florida and by Barretts in California.²⁹ State breeders' associations administer many of the smaller more regional auctions, which tend to be limited to horses foaled within a particular state and or horses eligible for that state's breeders' incentive programs.³⁰ Despite the vast expansion of the auction market from its initial isolated existence in Kentucky and New York to its current nationwide status,³¹ one cannot conceivably overstate the significance of Kentucky's auctions to the overall thoroughbred industry. In 2005 nearly 60% of the total gross revenues from the auction of thoroughbred horses in the United States were derived from sales conducted in the state of Kentucky.³² (This figure would increase even more substantially if one were to include horses bred and raised in Kentucky, but eventually auctioned in other states). As such, the choice of Kentucky law as the basis for this article and the use of sales regulations promulgated by Keeneland and Fasig Tipton is in no way symptomatic of any innate regional bias on the part of the author, but rather, the pertinence of the state in the thoroughbred auction context.³³ The "law" of thoroughbred horse racing, for all intents and purposes, is the law of the state of Kentucky.

C. *History of Banditry*

The history of the thoroughbred auction market and the thoroughbred industry in general, is one that has been marred by a persistent veil of

26 See Fasig–Tipton Company Inc., <http://www.fasigtipton.com/about/history.htm> (last visited June 30, 2007).

27 A select sale is a public auction in which the entrants are pre-examined by expert appraisers and are only accepted into the sale if they meet specified criteria for pedigree and confirmation. JACK LOHMAN & ARNOLD KIRKPATRICK, *SUCCESSFUL THOROUGHBRED INVESTMENT IN A CHANGING MARKET* 78 (Thoroughbred Publishers Inc., 1984).

28 THE BLOOD–HORSE AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 16, at 19.

29 *Id.*

30 *Id.* at 20.

31 For a more complete indication of the nationwide character of the United States' thoroughbred auction scene, see Thoroughbred Times, Auction Results, <http://www.thoroughbredtimes.com/sales/auctions.aspx> (last visited June 30, 2007).

32 See Kentucky Equine Education Project (KEEP), Kentucky Equine Economy, <http://www.horseswork.com/facts.htm> (last visited August 8, 2007).

33 Dan Metzger, president of the Thoroughbred Owners and Breeders Association (TOBA) stated the following in reference to pending thoroughbred legislation in Kentucky: "We (TOBA) have to be careful about getting involved with "local" issues, but Kentucky is the centerpiece of the industry. This is not only of national significance, but international significance as well." Ryan Conley, *Compromise Tables Legislation Backed by Jackson*, THE BLOOD–HORSE, February 14, 2007, available at http://www.bloodhorse.com/viewstory_plain.asp?id=37567.

underhanded dealing and questionable ethics.³⁴ Since horse sales began in North America there have been whispers of false bidders who conspire with agents to run up the prices of horses as they pass through the sales ring.³⁵ Rumors circulate of backroom deals between buyers and sellers, trainers and agents, all intended to “indoctrinate” wealthy newcomers to the sport. Rather than existing in the shadows (as one might rationally expect), these practices are viewed by many industry participants as a part of the “charm” of thoroughbred racing – an enviable renaissance of capitalism in its truest form.³⁶ One can do no better than to cite the following parable:

A wealthy industrialist came down to Kentucky, with a notion of getting into the horse business. “I’ve got plenty of money,” he told a number of people, “what I need is someone in the horse business with some experience to help me out.” Sure enough as you might expect would happen to anyone going around advertising he had plenty of money, the wealthy industrialist found someone with experience in the horse business. It also wasn’t much more than a year before the industrialist had to admit to a friend, “It wasn’t too long before he had the money and I had the experience.”³⁷

The colloquial use of the term “horse-trader,” meant to describe an individual who conducts his business in an unfair and devious manner,³⁸ (much like the individual above) is symptomatic of this unfavorable, albeit not entirely undeserved, reputation. Illicit practices are certainly not unique to the horse industry—under-the-table deals are presumably part of any business where people and money are involved, and the process of valuation is so inherently uncertain. But it is the nature of the typical horseman—the propensity to gamble, to challenge the odds, to seek every

34 See generally Joe Drape, *A Horseman’s Lawsuit Puts Trading Practices in the Spotlight*, N.Y. TIMES, May 3, 2006, at D1; Ray Paulick, *Buyer Beware*, THE BLOOD-HORSE, April 3, 2004, at 1953; Ray Paulick, *Jackson To Push For Licensing of Bloodstock Agents*, THE BLOOD-HORSE, May 4, 2006, available at http://www.bloodhorse.com/viewstory_plain.asp?id=33391; Janet Patton & Mary Meehan, *Shady Dealing Has Been Hard to Rein In*, LEXINGTON HERALD LEADER, March 26, 2006, at A1; Jon Newbury, *Horse Buyer: System Crooked*, THE CINCINNATI POST, May 15, 2006, at A1; Keith Chamblin, *On Integrity of Sales*, THE BLOOD-HORSE, March 16 1985, at 1942.

35 Drape, *supra* note 34.

36 Tom LaMarra, *Panel: Ethics Code for Horse Sales Needs Teeth*, THE BLOOD-HORSE, Dec. 19, 2004, available at http://www.bloodhorse.com/viewstory_plain.asp?id=25743. “Baugh said the industry must get past the notion that horse trading—and the potential rip-offs associated with it—is romantic and an accepted part of the process.” *Id.* One of the most vocal proponents of this view is former Kentucky Governor Brereton C. Jones who stated the following about under the table payments in a recent deposition: “That is the beauty of the free-enterprise system, that you have the right to reward people who do business with you . . . I have done it on a few occasions. Quite frankly, I will continue to do so.” Drape, *supra* note 34.

37 LOHMAN & KIRKPATRICK, *supra* note 27, at 15.

38 Drew Kershner, *Horse Tradin’: Legal Implications of Livestock Auction Bidding Practices*, 37 ARK. L. REV. 119, 120 (1983).

conceivable edge—that has multiplied the influence and prevalence of these transactions in the thoroughbred industry.³⁹ “If you’ve got a little larceny in your heart,” one consignor warns, “you have a lot of opportunity to cheat people.”⁴⁰

D. Attempts at Reform

The past three years, however, have been witness to a concerted movement to improve the ethical environment of the thoroughbred auction scene. In 2004, prominent horse owner Satish Sanan decided to boycott the annual yearling sales in order to demonstrate to the industry that kickbacks and other fraudulent behavior would no longer be tolerated by the sport’s leading buyers.⁴¹ “There is just so much, I don’t want to use the word corruption, but underhanded deals that go on in this industry,” Sanan told a trade publication at the time; “frankly some of the people involved in this kind of behavior are so powerful that they kind of control the industry.”⁴² Sanan’s frustration led to the creation of the Alliance for Industry Reform (AIR), an initiative he founded in late 2004 to motivate the racing industry to resolve the problems associated with its sales.⁴³ In response to Sanan’s persistent urging, the Thoroughbred Owners & Breeders Association (TOBA) formed a Sales Integrity Task Force to address these concerns under more official auspices. Under the chairmanship of Cot Campbell⁴⁴ and with the assistance of Sanan, the task force issued their findings in December 2004. The group adopted a code of ethics dealing with dual agency, crafted a model buyer–agent disclosure agreement, established

39 Miller, *America Singing*, *supra* note 10, at 785–90. Miller speaks of the typical horseman as the singular confluence of the bandit and the saint, at once entirely ethical and unspeakably deviant. *Id.* There is, from the experience of this author, much truth to that statement.

40 Chamblin, *On Integrity of Sales*, *supra* note 34 (quoting Carl Bowling, owner of Straightaway Farm).

41 See generally Mark Simon, *Time to Level the Sales Playing Field*, THOROUGHBRED TIMES, July 24 2004, at 16; *News Updates: Sanan to Boycott Select Yearling Sales*, THOROUGHBRED TIMES, July 11 2004, http://www.thoroughbredtimes.com/todaysnews/newsview_print.asp?recno=46863; Ray Paulick, *Agents For Change*, THE BLOOD–HORSE, March 21 2006, at 1795; Ray Paulick, *Ethics For Sale*, THE BLOOD–HORSE, July 14, 2004, at 3819; Tom LaMarra, *Sanan: Regulation of Sales Business Needs Teeth*, THE BLOOD–HORSE, July 4, 2004, available at http://www.bloodhorse.com/viewstory_plain.asp?id=23256.

42 Patton & Meehan, *supra* note 34.

43 Letters: Satish Sanan, *It’s Time to Clean House*, THE BLOOD–HORSE, April 17, 2004, 2182; LaMarra, *Sanan: Regulation of Sales Business Needs Teeth*, *supra* note 41; Paulick, *Ethics for Sale*, *supra* note 41.

44 For a biography of W. Cothran “Cot” Campbell, see Interview With Cot Campbell, Dogwood Stables, <http://www.dogwoodstable.com/cots-interview.shtml> (last visited June 30, 2007).

disclosure guidelines for veterinary procedures, and created a buyer education program.⁴⁵

The TOBA code of ethics was met with mixed opinion and mixed results, however, and the momentum for reform seemed to slow substantially in 2005.⁴⁶ That is until California winemaker Jess Jackson (“who like Sanan several years earlier entered the industry with deep pockets and big dreams”)⁴⁷ filed a lawsuit against his former advisors, claiming that he had been defrauded in the purchase of numerous thoroughbred yearlings.⁴⁸ In addition to the suit, Jackson began a vigorous nationwide campaign to change the basic manner in which the Kentucky thoroughbred industry conducts its business. Jackson’s campaign has culminated in the passage of HB 446 (a Kentucky law forbidding dual agency), but his quest for reform continues.⁴⁹ The significance of these efforts for the purposes of this Note is the context in which they place the propriety of seller–rebate agreements. This analysis cannot take place in a vacuum, but instead, must be conducted according to the prevailing norms of the thoroughbred industry—the current tenor of reform must be considered if one is to develop a meaningful examination of this practice.

II. AUCTION LAW

A. Basic Contractual Framework

An auction is defined as a public sale of property by means of competitive bidding.⁵⁰ The “fall of the hammer” at the conclusion of such bidding signifies the formation of a binding contract between the seller and the

45 See Thoroughbred Owners & Breeders Association Sales Integrity Task Force, <http://www.salesintegrity.org/home.html> (last visited March 12, 2007); Dan Liebman & Deirdre Biles, *Code of Ethics for Auctions Announced*, THE BLOOD–HORSE, December 16, 2004, available at http://www.bloodhorse.com/viewstory_plain.asp?id=25831.

46 See Deirdre Biles, *Code of Ethics Introduced*, THE BLOOD–HORSE, December 25, 2004, at 7339; Cot Campbell, *Integrity No Easy Task*, THE BLOOD–HORSE, January 15, 2005, at 394; Paulick, *Buyer Beware*, *supra* note 34.

47 Paulick, *Buyer Beware*, *supra* note 34.

48 Newberry, *supra* note 34; Ray Paulick, *Jones Defends Payment of Commissions to Former Jackson Adviser*, THE BLOOD–HORSE, March 17, 2006, available at http://www.bloodhorse.com/viewstory_plain.asp?id=32618; Drape, *supra* note 34.

49 See e.g., Ray Paulick, *Jackson to Push For Licensing of Bloodstock Agents*, *supra* note 34; Deirdre Biles, *Thoroughbred Industry Reacts Positively to Jackson Legislation*, THE BLOOD–HORSE, January 27, 2006, available at http://www.bloodhorse.com/viewstory_plain.asp?id=31943.

50 Leonard D. DuBoff, *Auction Problems: Going Going Gone*, 26 CLEV. ST. L. REV. 499, 500 (1977).

buyer,⁵¹ with the auctioneer serving as the agent of both parties.⁵² The act of bidding is said to constitute an offer by the putative buyer, and the acceptance and ratification of the final bid by the auctioneer is deemed to be an effective acceptance of that offer.⁵³ Like any other contract, a purchase at auction is to be enforced according to its terms.⁵⁴ Thus, the mere tip of a hat or nod of a head in the sales arena⁵⁵ is considered not only an offer to purchase at a stated price, but an offer to purchase according to the litany of terms and conditions published in the auction catalogue.⁵⁶ In Kentucky, the purchase of a thoroughbred horse at auction is considered a commercial transaction,⁵⁷ and as such, is governed by Kentucky's version of the Uniform Commercial Code.⁵⁸ The Code acts in concert with the stated terms and conditions of the particular sale to create the legal framework under which any public equine transaction occurs.⁵⁹

B. Reserves

There are generally two methods for a seller to offer property for sale at an auction: either with reserve or without reserve.⁶⁰ In an auction with reserve the seller establishes a minimum value under which he will not permit

⁵¹ David Carl Minneman, Annotation, *Auction Sales Under §UCC 2-328*, 44 A.L.R. 4th 110, § 2(a) (1986).

⁵² The role of the auctioneer is an exception to the general rule that a party may not act as agent for both sides in a transaction. 3A LARRY LAWRENCE, ANDERSON ON THE UNIFORM COMMERCIAL CODE §§ 2-328 to -329 (3d ed. 1985). Kentucky's dual agency legislation makes this fact explicit: "auction companies shall not be deemed to be dual agents for all purposes under this section." KY. REV. STAT. ANN. § 230.357(8) (West 2006).

⁵³ LAWRENCE, *supra* note 52, §§ 2-328 to -329.

⁵⁴ Minneman, *supra* note 51, § 2(b).

⁵⁵ Bids may be entered by creative signals arranged between the bidder and the auctioneer to conceal the fact that an individual is bidding. In that vein, auction bidders have been described as "hand-wavers, head-nodders, shouters, pencil-flickers, eye-blinkers, ear-tug-gers, and lapel-flippers." DuBoff, *supra* note 50, at 503 n.24.

⁵⁶ See, e.g., 2006 Keeneland April Two Year Olds in Training Sale, Conditions of Sale, First Condition ("This sale is governed by these Conditions of Sale . . . All sellers, consignors, agents, owners, prospective bidders/buyers, all other interested parties and all sales are therefore bound by and subject to the provisions of the Conditions of Sale as set forth in this catalogue and Announcements"). The conditions of sale are the rules and regulations that cover business ranging from extension of credit to resolution of bidding disputes and other particulars. See, e.g., *id.*

⁵⁷ *Cohen v. N. Ridge Farms, Inc.*, 712 F. Supp. 1265, 1272 (E.D. Ky. 1989).

⁵⁸ KY. REV. STAT. ANN. section 355.2-328 is a direct codification of section 2-328 of the Uniform Commercial Code, which deals with sales by means of auction. Compare KY. REV. STAT. ANN. § 355.2-328 with U.C.C. § 2-328 (1992). These UCC provisions are supplemented by KY. REV. STAT. ANN. section 330.210, which specifically addresses the sale of horses by auction in Kentucky.

⁵⁹ See *Cohen*, 712 F. Supp. at 1269.

⁶⁰ DuBoff, *supra* note 50, at 508.

the auctioneer to sell the property;⁶¹ in an auction without reserve there is no such “upset” price.⁶² “If I place a reserve of \$350,000 on a horse I would be happy if someone bid \$351,000 on the horse,” explains Duncan Taylor of Taylor Made Sales Agency.⁶³ “The reserve is not necessarily the price we think the individual is worth but any bid over the set reserve is the price we are willing to let the horse be sold for.”⁶⁴ Under Kentucky law, a sale by auction is presumed to be with reserve unless it is explicitly stated prior to the auction that it is, in fact, without reserve.⁶⁵ Setting a reserve is purely voluntary on the part of the consignor, although by conservative estimates, more than 80% of all horses that enter the auction ring in Kentucky do so subject to a reserve.⁶⁶ American auctioneers have generally adopted the policy of permitting concealed reserve bids,⁶⁷ and section 330.210 of the Kentucky Revised Statutes Annotated specifically provides that an auctioneer “shall not be required to announce at any with-reserve sale when the reserve is attained.”⁶⁸ Despite this statutory permission, if a horse fails to reach its reserve bid, that fact must be noted in the official sales results and the hammer price of the horse excluded from any published cumulative totals, so as to prevent any undue distortion of the auction market.⁶⁹

61 *Id.*

62 *See* *Feaster Trucking Serv., Inc. v. Park-Davis Auctioneers, Inc.*, 505 P.2d 612, 616 (Kan. 1973). In an auction without reserve the seller is obligated after the bidding has begun to sell to the highest bidder and cannot withdraw the property after that time. KY REV. STAT. ANN. § 355.2-328(2).

63 Keith Chamblin, *Reserving the Right to Define Reserve*, THE BLOOD-HORSE, March 23, 1985, at 2108 (quoting Duncan Taylor). Taylor Made Sales Agency is regularly the largest consignor of thoroughbreds at auction in the United States. Taylor Made led all consignors by gross receipts in every thoroughbred auction held in Kentucky in 2006. *See* Taylor Made, http://www.taylormadefarm.com/public_sales (last visited June 23, 2007).

64 Chamblin, *Reserving the Right to Define Reserve*, *supra* 63 at 2108 (quoting Duncan Taylor).

65 KY. REV. STAT. ANN. § 355.2-328(2).

66 Chamblin, *Reserving the Right to Define Reserve*, *supra* note 63, at 2109 (quoting Rogers Beasley, Keeneland Director of Sales).

67 *Id.* at 2108; DuBoff, *supra* note 50, at 508-09.

68 KY. REV. STAT. ANN. § 330.210(3).

69 *See, e.g.*, 2007 Keeneland January Horses of All Ages Sale, Monday Session Results, <http://apps.keeneland.com/data/session.asp?SaleID=200704&Session=1> (last visited July 8, 2007) (“Number of Head Sold, Number of Shares Sold, Number of Seasons Sold, Gross Amount and Average DO NOT INCLUDE RNA’s (RNA – Reserve Not Attained)”). The concept of market distortion will be discussed in greater detail *infra* notes 109-117 and accompanying text.

C. Puffing and Chilling

As a general principle, sellers and their agents are not permitted to bid on property they have entered in an auction sale.⁷⁰ Individuals who are employed for such a purpose are known primarily as puffers, but may also be known as by-bidders, cappers, decoy ducks, sham-bidders, or white bonnets.⁷¹ A “puffer” in the strictest meaning of the word, is a person who, without having any intention to purchase an item, is employed by the seller to raise the price by fictitious bids, thereby increasing competition, while he himself is secured from the risk of purchase by an understanding with the seller that he shall not be bound by his bids.⁷² The employment of a puffer is a legal fraud upon legitimate bidders,⁷³ and entitles a successful bidder to rescind the auction contract or take the goods at the last good faith bid prior to the completion of the sale.⁷⁴ Puffing or buy-bidding is considered fraudulent because “it undermine[s] the fairness, openness, and competitive determinations of price which are meant to be the distinguishing characteristics of auctions as market mechanisms.”⁷⁵ There is no such fraud, however, if all buyers are notified in advance of the sale that the right to bid has been reserved by all sellers and their disclosed or undisclosed agents.⁷⁶ The terms and conditions of sale for auctions held at both Keeneland and Fasig Tipton include such by-bidding provisions,⁷⁷ and thus one cannot legitimately bring an action for “puffing” at a public sale of a thoroughbred horse in Kentucky.⁷⁸

70 KY. REV. STAT. ANN. § 355.2–328(4).

71 *Manuel v. Halesden*, 268 S.W. 554, 556 (Ky. 1925).

72 *Peck v. List*, 1883 WL 3306, at *23 (W. Va. Dec. 20, 1883).

73 For a complete history of the origins of “puffing” as a cause of action, beginning with its roots in England’s Equity Courts to its adoption by the United State’s Supreme Court, *see id.*; *McMillan v. Harris*, 35 S.E. 334 (Ga. 1900).

74 KY. REV. STAT. ANN. § 355.2–328(4).

75 Kershen, *supra* note 38, at 123.

76 KY. REV. STAT. ANN. § 355.2–328(4).

77 2006 Keeneland April Two Year Olds in Training Sale, Conditions of Sale, Second Condition (Applicable Governing Law: “In accordance with KRS §330.210 and §355.2–328(4) and other applicable laws, the right to bid in this sale is reserved for all sellers, including their disclosed and undisclosed agents, unless otherwise announced at time of sale. Buyers therefore agree and acknowledge that sellers . . . have the right to conduct buy-bidding as related to their entries”); 2006 Fasig-Tipton November Selected Mixed Sale, Conditions of Sale, First Condition (Applicable Law: “All horses in this sale are offered according to the laws of the state wherein the sale is conducted. The right to bid, as provided under the law, is reserved for all Consignors, including owners and their agents, unless otherwise announced by Auctioneer”).

78 This is not to say that the concept of puffing is insignificant—the analysis of puffing agreements establishes an archetype for the analysis of seller–rebate agreements, as one is able to draw effective parallels between the policy concerns that illuminate both practices.

If puffing represents one pole of illegality in the auction setting, the opposite pole is represented by conduct stifling competition or bid-chilling. This behavior includes agreements between prospective bidders not to compete,⁷⁹ words or actions intended to discourage bidding and disparage the property, or any other bidding technique which unfairly diminishes the price ultimately paid for the item being auctioned.⁸⁰ While puffing uses artificial competition to inflate the price to the advantage of the seller and the detriment of the buyer, bid-chilling dampens competition and thus decreases the price to the benefit of the buyer and the disadvantage of the seller.⁸¹ Regardless of the identity of the aggrieved party however, any agreement entered into with the intention of secretly altering prices at an auction sale (whether by raising or lowering such prices) is fraudulent as a matter of law.⁸² This blanket statement clearly covers both puffing and bid-chilling, but it is also meant to encompass any other activity which cannot be conveniently shoehorned into either category. It would appear that the use of a seller-rebate agreement would be just such an activity, but without a more direct judicial statement to that effect, it is perhaps unwise to be so unduly categorical.

D. Seller-Rebate Agreements

While a seller-rebate agreement is a clear attempt to manipulate the auction market to the economic advantage of the seller and the rebate buyer,⁸³ it is not an agreement to stifle bidding,⁸⁴ nor can it be labeled a traditional puffing agreement.⁸⁵ Nonetheless, the handful of courts that have addressed rebate agreements, even tangentially, have looked upon

79 The most nefarious type of collusion practiced at auction sales is the use of bidding rings or bidding cartels. This practice occurs when a group of potential bidders agree to select one member of their group to bid on goods at an auction sale, and then conduct a "knock-out" auction to reapportion the goods within the ring. The difference between the price paid at public auction and that paid at the private knock out auction is divided among the members of the ring. DuBoff, *supra* note 50, at 506. The secret reserve system was established, in large part, to combat such techniques.

80 Kershen, *supra* note 38, at 164.

81 See Comment, *Agreements for Fictitious Bids at Auction*, 31 YALE L.J. 431 (1921).

82 7 AM. JUR. 2D *Auctions and Auctioneers* § 30 (2007).

83 Kershen, *supra* note 38, at 166.

84 The practical purpose of a seller-rebate agreement is to generate increased bidding and thus garner greater returns for the seller. *Id.* This is entirely contrary to the notion of bid stifling which is intended to reduce bidding activity.

85 Rebate bidders are persons who will in fact be held accountable for some price within the range of bids entered at the auction. Hence, rebate bidders are not technically puffers because puffers are those persons who enter completely fictitious bids for which they are not at all accountable. *Id.*

such secret negotiations with considerable distaste.⁸⁶ No court has directly ruled on the legality of seller–rebate agreements, however, and even those courts that have spoken against them with the most vehemence have not done so in a context in which seller by–bidding has also been permitted. As such, the parallels drawn in such cases between the effect of puffing agreements and those of seller–rebate agreements must be tempered to a certain degree, if not simply examined with a more heightened particularity. This statutory allowance of by–bidding and its attendant consequences does not render an examination of seller–rebate agreements wholly superfluous however. A contractual decision to permit by–bidding does not constitute an equivalent decision to permit the use of seller–rebate agreements (or any other of the panoply of secret devices one may conceive of to inflate the price at an auction sale). Simply because puffing (or by–bidding) is permitted it does not necessarily follow that rebate agreements are equally permissible, especially when one considers that it is the disclosure of the puffing behavior that grants it its legitimacy, and not the propriety of the activity itself. Although both Keeneland and Fasig Tipton do provide the necessary disclosures for by–bidding practices (as noted previously), there are no such disclosures for seller–rebate agreements, and it remains to be seen whether any such disclosure would even be sufficient to remove the taint of impropriety presented by such an agreement. The existing case law is scarce and far from dispositive, but viewed in its totality it is, at the very least, instructive and thus worthy of further review.

E. Case Law

In the case of *Osborn v. Apperson Lodge*, a purchaser of land at auction sought rescission of the auction contract on the basis of puffing through the use of rebate bidders.⁸⁷ The Kentucky Court of Appeals expressed a general disapproval of rebate agreements, but ruled that the purchaser had no cause of action because the price of the specific lot which he had purchased had not been influenced by the use of these rebate bidding practices.⁸⁸ The court implied, however, that the purchaser *may* have had a cause of action if the sale in which he had purchased the lot had in fact been influenced by rebate bidding.⁸⁹

Kentucky's highest court was faced with another seller–rebate agreement just two years later in the case of *Robenson v. Yann*.⁹⁰ In that

⁸⁶ See generally *Osborn v. Apperson Lodge*, 281 S.W. 500 (Ky. 1926); *Robenson v. Yann*, 5 S.W.2d 271 (Ky. 1928); *Jennings v. Jennings*, 108 S.E. 340 (S.C. 1921), *Peck v. List*, 1883 WL 3306 (W. Va. Dec. 20, 1883) (explaining the case of *Bexwell v. Christie*, 1 Cow. 395).

⁸⁷ *Osborn*, 281 S.W. at 501–02.

⁸⁸ *Id.* at 502.

⁸⁹ *Id.* at 502–03.

⁹⁰ See *Robenson v. Yann*, 5 S.W.2d. 271 (Ky. 1928).

instance, a rebate bidder sued the seller for specific performance of the auction contract at the discounted rebate price.⁹¹ The court refused to order the requested specific performance, stating that the agreement between the parties could not have been entered into "except to deceive somebody, if nobody else, the other bidders at the sale," and as such, they would leave the parties where they had placed themselves.⁹²

In *Jennings v. Jennings*, a rebate bidder sued an auction seller to collect the compensation promised to him by the seller if the bids were raised above a certain level.⁹³ The South Carolina Supreme Court held that although the rebate agreement was "of doubtful wisdom and propriety" and may even be "violative of the implied guarantee that all public sales are genuine," they did not believe that the validity of the practice needed to be adjudged in the particular case as no good faith bidder was a complainant in the action.⁹⁴

The most stinging rebuke of seller–rebate agreements came in dicta in the English case of *Bexwell v. Christie* – the case cited by the United States Supreme Court as the "pole–star" of judicial decisions outlawing puffing at auction sales, and thus one that should be granted considerable weight in any potential analysis.⁹⁵ In that case Lord Mansfield opined as follows:

Suppose there was an agreement privately with a particular person, that if he was the highest bidder, so much would be abated; frequently abatements from the price fixed by the vendor are made on a private sale of course legitimately; sometimes ten or fifteen percent is thus abated. But a private agreement of this sort between the owner and the bidder, at a sale by auction would be a *gross fraud*.⁹⁶

Not one of the above cases however, involved a fact situation in which a court was directly faced with a lawsuit between a good faith purchaser and a seller who utilized a rebate agreement at an auction sale. These cases do not provide an answer; they merely provide a context for subsequent examination, and offer a clue as to the judicial sentiment which would illuminate a future decision if the issue were ever presented to a court in the Commonwealth of Kentucky. What follows, therefore, is not necessarily a statement of the law as it currently exists, but is instead a survey of the legal and policy factors that may weigh against the validity of these agreements if such an action were ever conceivably entertained at the judicial level.

⁹¹ *Id.* at 272.

⁹² *Id.* at 273.

⁹³ *Jennings v. Jennings*, 108 S.E. 340, 340 (S.C. 1921).

⁹⁴ *Id.* at 341.

⁹⁵ *Veazie v. Williams*, 49 U.S. 134, 154 (1850).

⁹⁶ *Peck v. List*, 1883 WL 3306, at *23 (W. Va. Dec. 20, 1883) (quoting *Bexwell v. Christie*, 1 Cow. 395) (emphasis added).

III. ANALYSIS

A. *Free and Fair Competition*

An essential element of an auction sale is the opportunity for free and fair competition among bidders.⁹⁷ Any agreement between buyer and seller or between buyers that is “unfairly restrictive of that opportunity is against public policy and void.”⁹⁸ All bidders at an auction sale have a right to suppose that they are bidding on equal terms,⁹⁹ and thus, even though the owner of property sold at auction has the right to prescribe the manner, terms, and conditions of sale,¹⁰⁰ these announced terms may not be varied as to a particular bidder by prior agreement with him.¹⁰¹ The price of a horse (or any other good sold at auction) is to be determined by competitive bidding, not competitive dealmaking.

The statutory authorization for concealed reserve prices and the disclosed seller self-bidding that is standard in today’s thoroughbred auction market¹⁰² does nothing to eliminate this fairness requirement. Instead, it merely sets the parameters within which “free and fair competition” is to take place. Reserves may be set, sellers may bid, and yet all bona fide buyers must stand upon equal footing.¹⁰³ Whatever one’s opinion of the desirability of secret reserves or disclosed by-bidding, there can be no dispute that both practices affect all potential buyers equally. If they are egregious practices, (and many believe they are),¹⁰⁴ then all are equally aggrieved.

For instance, assume a situation in which Buyer X and Buyer Y both wish to purchase Seller Z’s horse at an auction sale. Seller Z has placed a \$300,000 reserve on the horse and has authorized his undisclosed agent to bid up to \$500,000 on his behalf. Buyers X and Y are thus subject to the same pattern of inflationary bidding by the seller up to \$500,000;¹⁰⁵ neither is advantaged in any way and neither will be able to purchase the horse for

97 See *Feaster Trucking Serv., Inc. v. Parks–Davis Auctioneers, Inc.*, 505 P.2d. 612, 616 (Kan. 1973); *Manhattan Taxi Serv. Corp. v. Checker Cab Mfg. Corp.*, 171 N.E. 705, 707 (N.Y. 1930).

98 *Manhattan Taxi Serv. Corp.*, 171 N.E. at 707.

99 *Peck*, 1883 WL 3306, at 28 (quoting *Hopkins v. Tanqueray*, 15 Com. Bench 130 (80 Eng. Com. Law)).

100 7 AM. JUR. 2D *Auctions and Auctioneers* § 17 (2007).

101 *Id.*

102 See *supra* note 77 and accompanying text.

103 7 AM. JUR. 2D *Auctions and Auctioneers* § 17 (2007).

104 For a representative critique of the reserve system, see DuBoff, *supra* note 50, at 510–12.

105 Buyers X and Y are subject to bids from both the auctioneer and the seller’s agent on the seller’s behalf, in addition to other good faith bids up to \$300,000. Subsequent to that, they are subject to bids from the agent and the other good faith bidders from \$300,000 to \$500,000, and subject only to bids from other good faith bidders from \$500,000 on.

any figure below that price. Beyond \$500,000, however, the ownership of the horse will be determined solely by the valuations placed on the animal by the bidders, and their respective financial abilities. If Buyer X is willing to bid \$550,000, and Buyer Y is willing to pay \$560,000, then the horse will belong to Buyer Y, and he will be responsible for the full value of that bid. This notion of supply and demand is the very essence of a sale by auction. At the conclusion of the bidding the property is to go to the party who is willing to pay the highest price¹⁰⁶ – it is the necessary result of free and fair competition, and is the founding principle of economic auction theory.¹⁰⁷

This basic principle is undermined, however, if one is to utilize a seller–rebate agreement. Assume the same hypothetical as above, except instead of Seller Z authorizing his agent to bid \$500,000, he enters into an arrangement with Buyer X whereby X agrees to bid \$500,000 for the horse, and buyer and seller will divide any sum in excess of that threshold 50/50 regardless of the eventual purchaser. As above, Buyer X is still only willing and able to pay \$550,000 for the horse, whereas Buyer Y is still willing and able to pay \$560,000. All else being equal, the horse should once again belong to Buyer Y at the conclusion of the auction for he is the party willing to pay the highest price. In this instance, however, Buyer X's previous \$550,000 limit has been converted into the ability to bid as high \$600,000 as a result of his agreement with the seller. From \$500,000 forward Buyer X is essentially bidding with fifty cent dollars—his financial responsibility for each bid is fifty percent less in every case than that of Buyer Y. If he bids \$570,000 he will, under the facts of this hypothetical, be able to purchase the horse, (Buyer Y having reached his limit), and yet he will only truly be responsible for a sum of \$535,000. Fairness in the auction context does not mean absolute equality—certain buyers have larger budgets, others are able to establish more favorable payment terms with the sales company¹⁰⁸—but one cannot speak of fairness in any meaningful sense when a single buyer is to be held responsible for only half of the dollar value of his bid. Fairness simply cannot be the label one gives to a scenario in which \$535,000 is suddenly adjudged to be a more significant sum than \$550,000. A seller–rebate agreement clearly violates the basic notion of an auction as a free and fair competition between equally situated bidders.

¹⁰⁶ *Towle v. Leavitt*, 23 N.H. 360, 367 (1851).

¹⁰⁷ “In an ascending auction, price and allocation are determined in an open competition among the bidders. The bidders willing to pay the most win and pay prices that no other bidders are willing to top.” Peter Cramton, *Ascending Auctions*, 42:3–5 *EUROPEAN ECON. REV.* 745, 746 (1998); *see also* R. Preston McAfee & John McMillan, *Auctions and Bidding*, XXV *JOURNAL OF ECON. LIT.* 699, 721–22 (1987).

¹⁰⁸ THE BLOOD–HORSE AUTHORITATIVE GUIDE TO AUCTIONS, *supra* note 16, at 43; Keeneland Sales Buyer Registration Form/Credit Application, http://www.keeneland.com/sales/libraries/forms/buyer_reg.pdf (last visited July 8, 2007).

B. Market Distortion

The economic impact of an auction sale extends far beyond the sum of the individual transactions that constitute the sale itself.¹⁰⁹ The price paid for any one item at an auction directly effects the valuation of other items to be sold at that auction and related goods in the non-auction market.¹¹⁰ Thoroughbred buyers use the prices paid at auction to assist them in making judgments about the worth of similar horses,¹¹¹ to determine the value of the stallions and mares that have produced these individuals,¹¹² and to assess collateral appraisals for the secured loans that are the lifeblood of the thoroughbred industry.¹¹³ “In short, auctions have a public function that deeply affects broader segments of the thoroughbred economy.”¹¹⁴ As such, the accurate reporting of auction prices is a crucial element in the maintenance of a legitimately valued equine market. It is to this end that sales companies are required to exclude from their totals the hammer price of individual horses that did not meet their reserve bid, and to indicate this fact on the published summary of sale.¹¹⁵ This practice serves to ensure that buyers are not misled into believing that items have been sold for prices higher than they were able to bring. It also protects other potential sellers from overstating the value of their own goods and subsequently setting unrealistic reserve prices. If a horse is purchased by a bidder who has entered into a seller–rebate agreement with a vendor, the price listed in the official sales results will not accurately reflect the actual value paid for the horse. This situation is no different than when a horse fails to reach its reserve bid and thus should be treated no differently. In fact, the improper reporting of rebate purchases is more likely to distort the overall market, as the eventual change in the horse’s registered ownership post-sale to a bona fide third party is likely to remove any specter of impropriety that would otherwise exist.

The published price of a horse purchased via a rebate agreement misleads others in the marketplace (owners, breeders, and equine lenders respectively), as to what they should pay for comparable individuals, what they can legitimately charge for a breeding to a stallion, or how much they should lend to a particular industry participant. At an even deeper level,

109 See Miller, *The Sale of Horses and Horse Interests*, *supra* note 20, at 534–35; SMITH, *supra* note 22, at 3.

110 For example, “the recent auction of Van Gogh’s *Irises* for over \$50 million, for example, not only set the price for the *Irises*, but also affected the price of all Van Gogh’s paintings and all Postimpressionist paintings in general.” SMITH, *supra* note 22, at 3.

111 Kershen, *supra* note 38, at 166.

112 Miller, *America Singing*, *supra* note 10, at 783.

113 See, e.g. Miller, *The Sale of Horses and Horse Interests*, *supra* note 20, at 534.

114 *Id.* at 535.

115 See *supra* note 69 and accompanying text.

if these overstatements are not considered fraudulent per se, they are, at the very least, a vehicle to enable subsequent fraudulent behavior by the rebate purchaser. The hyping or misreporting of auction prices can be and has been an effective means of defrauding lenders into providing loans far in excess of the actual value of the collateral provided by the debtor as security for that loan.¹¹⁶ A similar fraudulent scheme can be conducted via the resale of percentages of the rebated horse, utilizing the overstated sales price as a "fair and impartial" assessment of the value of the partial share offered for purchase.¹¹⁷ Although neither of these practices are the necessary result of the use of rebate agreements, they are made infinitely more manageable by their existence, and thus provide an additional reason to limit their use.

C. Market Price

Implicit in subsections A and B above is the notion that a properly conducted auction functions to establish an incontrovertible fair price (or market value) for the item being sold.¹¹⁸ All else being equal, an item sold at auction will be awarded to the bidder who values it the most highly, at a price one unit¹¹⁹ greater than that of the second highest valuation.¹²⁰ This price is considered to be both fair and accurate because it is the direct result of an efficient market process in which the knowledge of all parties present at the auction is impounded into the final price.¹²¹ This price discovery process is entirely ineffective however, if a particular bidder is entitled to a percentage rebate on the announced price of his final bid. In such an instance, the legitimate market price of the horse (or good) sold

¹¹⁶ For an instructive discussion of the use of auction price misreporting and or "questionable" auction practices generally, see ANN HAGEDORN AUERBACH, *WILD RIDE: THE RISE & TRAGIC FALL OF CALUMET FARMS* 198, 200-06 (Henry Holt & Company L.L.C. 1995).

¹¹⁷ See Kershen, *supra* note 38, at 147, 166.

¹¹⁸ See, e.g., Cramton, *supra* note 107, at 746-47; McAfee & McMillan, *supra* note 107, at 721-22.

¹¹⁹ What is meant by a "unit of value" depends on the size of the bid increments accepted by the auctioneer at that particular point in the auction. If the asking price of an item is approximately \$100, an auctioneer is likely to accept a bid of \$105; if the asking price is \$1,000,000 he may be inclined to only accept bids in minimum increments of \$100,000 and so forth.

¹²⁰ McAfee & McMillan, *supra* note 107, at 707.

¹²¹ *Id.* at 721. "In the common value model, the bidders lack complete information about the item's true value; each bidder has different partial information. However, even though no single bidder has perfect information, it can be shown that, if there is perfect competition in the bidding, the selling price reflects all of the bidder's private information. If information is sufficiently dispersed among the bidders then the selling price converges to the item's true value as the number of bidders becomes arbitrarily large With perfect competition, the price is equal to the true value even though no individual in the economy knows what the true value is and no communication among the bidders takes place." *Id.* at 721-22.

can be no higher than the final bid of the good faith underbidder (buyer Y's \$550,000 bid in our hypothetical), and is likely lower still.¹²² The sales price in such an auction (if defined to mean either the amount of the final bid or the amount actually paid) is clearly not the price that an unbiased market would have generated as there is a defect in the flow of information that is used to establish the market price.

This procedural distortion requires little additional explanation when the rebate bidder is the eventual purchaser, as was the case in subsections A and B. But, what is perhaps less clear is the pernicious effect of rebate bidding when a third party purchases the horse subject to the escalating bids of a rebate bidder. In such an instance it can be argued that there is no damage to the bona fide purchaser as he is not compelled to continue to bid, but instead, does so based on a rational assessment that the value of property to him merits the increased price.¹²³ Despite its facial appeal, the flaw in this argument is the assumption that there is a standard of value independent of the wishes and wants of the bidders themselves.¹²⁴ In most real auctions, participants seldom have established economic preferences; they do not enter the auction knowing the specific prices they are willing to pay,¹²⁵ and even if they do they frequently fail to abide by these self-imposed limits. (In fact, it is the goal of the auctioneer to ensure that they do not).¹²⁶ An auction does not simply reflect the predetermined value of an item—it is the auction process itself that determines its value.¹²⁷

¹²² According to Professor Kershen's analysis of the UCC, the crucial point in any pattern of bids entered at an auction is the point at which the seller intervenes in the auction to submit a rebate bid. *See* Kershen, *supra* note 38, at 137 n.44. Beginning with the first rebate bid, that bid and all later bids, even those from good faith bidders should be considered bad faith bids because the bidder is either a rebate bid or a bid induced by a rebate bid. *See id.* Hence, after the entry of a rebate bid it is legally irrelevant as to the number of good faith bidders who continue to bid or the order in which further bids from the rebate bidder and or good faith bidders are submitted. *See id.* This view appears to be in accord with that of Professors Hawkland and DuBoff. *See* W. HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC 40 (1964); DuBoff, *supra* note 50, at 506–07.

¹²³ This was the approach consistently advocated by Lord Chancellor Loughborough: "I feel vast difficulty to compass the reasoning, that a person does not follow his own judgment, because other persons bid." *Peck v. List*, 1883 WL 3306, at *28 (W. Va. Dec. 20, 1883) (quoting *Conolly v. Parsons*, 3 Vesey 625, 627).

¹²⁴ *Staines v. Shore*, 16 Pa. 200, 203 (1851).

¹²⁵ *See* Cramton, *supra* note 107, at 745.

¹²⁶ *See* DuBoff, *supra* note 50, at 504 ("Auctioneers try to charge the atmosphere with their banter, promoting spontaneous bidding which results in bidders acting before they have had a chance to reflect. Impulsive competitive bidding is known as auction fever and may result in an individual acquiring an object for a price which exceeds the amount he would be willing to spend if he had an opportunity to think before buying.").

¹²⁷ SMITH, *supra* note 22, at 16 ("Rather than using consensual principles of what constitutes objective worth to establish price, auctions, through competitive bidding, seek to establish standards of worth through price"). If that were not the case, if value were somehow certain, there would be no rational reason to sell the item at auction as one would attain the

This notion that bidders' valuations may to some extent be correlated with each other is captured by the economic concept of affiliation.¹²⁸ The general concept is deceptively simple and is based primarily on a notion of justifiable reliance: in any auction that combines private and common value elements (i.e. subjective and objective standards of valuation), the fact that a single bidder perceives the item's value to be particularly high makes it far more likely that other bidders will also perceive the value to be high, regardless of their previous inclinations about its value.¹²⁹ This reliance on the opinion of others is particularly pronounced when there is a legitimate resale market for the good being auctioned (as there is in horse sales), or more generally, when a single bidder does not possess a monopoly on the relevant information needed to assess the item's value (again, a truism in the thoroughbred sales context).¹³⁰ A related behavioral effect of affiliation is the psychological comfort or certainty that such a process generates. A given bidder is reassured by each subsequent third party bid that others have valued the property in a similar manner to him and are willing to pay an equivalent sum.¹³¹ This effect cannot be underestimated when one considers that thoroughbred bidders are frequently asked to spend well in excess of a million dollars on an animal that is often less than a year old and has never stepped foot on a racetrack or worn a saddle or bit. In sum, open bidding competition reveals information that bidders use in revising their estimates of value. Since a bid is deemed to provide information about an item's value that is relied upon by good faith purchasers, any defect in that information (i.e. the fact that a particular bid may be subject to a rebate), necessarily impairs the purchaser's ability to accurately assess the item's worth. It is therefore no answer to say that an individual bid voluntarily or that the property was actually worth in the market the sum he bid for it, because while bidding that individual was laboring under a misapprehension that others had honestly valued the property near the same price.¹³² If one is to assume that a good faith bid is a "statement" of purported value utilized by purchasers to make buying decisions, it is not unreasonable to conclude that a rebate bid is, in fact, a material misstatement that is made "for the purpose of inducing another to act . . . in reliance upon it."¹³³ This is the very definition of a fraudulent misrepresentation, and thus this cause

same price through a private sale without the attendant costs.

128 For an explanation of affiliation, see McAfee & McMillan, *supra* note 107, at 705-06.

129 McAfee & McMillan, *supra* note 107, at 722.

130 *Id.*

131 *Id.* "If one takes the highest bid of the others as the market price, then it is impossible to overbid by more than one bid increment. Indeed, at the time the final bid is placed, the winner knows that others are willing to pay more for the item. Raising the bid in this state seems especially attractive." *Id.*

132 *Veazie v. Williams*, 49 U.S. 134, 152 (1850).

133 RESTATEMENT (SECOND) OF TORTS § 525 (1977).

of action may provide a conceivable remedy for a purchaser who has paid an inflated sum at an auction sale based on rebate bidding practices. At the very least, the parallel drawn should be of some concern to those who purport to extol the virtues of ethical auction practices.

D. Public Policy

The importance of the thoroughbred industry to the state of Kentucky has played a significant role in the judicial resolution of auction-related legal disputes. Auction sales generally, (regardless of the type of property to be offered), are considered a “public concern,” and as such, Kentucky’s courts have indicated that they “will not tolerate any fraudulent, unfair, or deceitful conduct in such sales.”¹³⁴ Based on legislative and judicial fiat it appears that the foregoing is doubly so when the item to be auctioned is a thoroughbred horse.¹³⁵ The state legislature has explicitly stated that it is its intent to foster and encourage the horse breeding industry in the Commonwealth, and to ensure that the industry conducts itself with the utmost of honesty and integrity.¹³⁶ Judicial decisions, beginning with *Chernick v. Fasig–Tipton Ky., Inc.*, have drawn from this instruction and have attributed a public interest to all parties involved in an equine transaction.¹³⁷ In the *Chernick* case itself, the Kentucky Court of Appeals utilized this very rationale to impose a fiduciary duty on auction companies¹³⁸ and to validate the imposition of punitive damages on the seller of a horse at an auction sale.¹³⁹ Similarly, in *Mixen Arabians v. Pyramid Society*, a federal court applying Kentucky law clearly indicated that it had tailored its decision so as to be “consistent with the overall policy goal of maintaining the integrity

¹³⁴ *Robenson v. Yann*, 5 S.W.2d 271, 274 (Ky. 1928); *see also Worswick v. Switzer*, 778 S.W.2d 226, 228 (Ky. App. 1998); *Burdon v. Seitz*, 267 S.W. 219, 220 (Ky. 1924); *Osborn v. Apperson Lodge*, 281 S.W. 500, 502 (Ky. 1926).

¹³⁵ *See* Paul Reynolds, Note, *Chernick v. Fasig Tipton: A Caveat to the Horse Trader*, 74 Ky. L.J. 889, 922 (1985). “We agree with the trial court that the Commonwealth of Kentucky maintains an international reputation for excellence in the equine industry. The conduct of one of the Commonwealth’s foremost consignors of breeding stock is not to be reviewed at level lower than that of strict scrutiny.” *Chernick v. Fasig–Tipton Ky., Inc.*, 703 S.W.2d 885, 890 (Ky. App. 1996).

¹³⁶ KY. REV. STAT. ANN. § 230.215 (2007).

¹³⁷ *Miller, The Sale of Horses and Horse Interests*, *supra* note 20, at 550.

¹³⁸ *See Chernick*, 703 S.W.2d at 890 (“[T]he trial court found, and we concur, that although under the terms of the consignment contract the Chernicks were responsible for the accuracy of all information contained within the catalog of sale, Fasig–Tipton had a fiduciary duty to the purchaser and to the Commonwealth’s most prestigious and valued industry to use ordinary care to ensure that its catalog and/or announcements were as accurate and comprehensive as possible”).

¹³⁹ *See id.* at 889–90.

of Kentucky's leading industry."¹⁴⁰ Finally, in the partnership case of *Marsh v. Gentry*, the unspoken imperative of the majority decision was the utility of encouraging outsiders to invest in the Kentucky thoroughbred industry.¹⁴¹ In his concurring decision in the matter, Justice Palmore made that fact explicit, noting that "the horse industry in Kentucky is far too important for questionable dealing to be tolerated by the courts."¹⁴² Therefore, even if one is to believe that a seller–rebate agreement may be generally permissible in the abstract, it does not necessarily follow that such agreements are permissible in the auction sale of a thoroughbred horse in Kentucky. Indeed, if a seller–rebate agreement is of questionable legality, then in Kentucky that question must be answered in a manner that is consistent with the promotion of the thoroughbred horse industry. The recent attempts to alleviate questionable auction practices, such as dual agency¹⁴³ and undisclosed ownership,¹⁴⁴ indicate an industry–wide consensus that the elimination of these practices is the means to accomplish this goal. The invalidation of seller–rebate agreements serves this very same purpose, and thus seems to be a mandated course of action if ever presented for judicial resolution.

CONCLUSION

In summary, the use of seller–rebate agreements at thoroughbred auction sales results in numerous pernicious effects. Such agreements undermine the accepted notion that a price established at auction is the result of free and fair competition, and casts doubt on whether the recorded auction price is truly an accurate reflection of the market value of the particular item. The published sales results in such a case mislead all who read them, leading to an inappropriately appraised equine market and the opportunity for fraud that such a distortion presents. Further, we have seen that public policy in Kentucky is to be dictated by what is best for the thoroughbred industry—one cannot make a persuasive argument that the above effects are in any way positive, and thus one cannot argue that seller–rebate agreements are consistent with this goal of encouraging investment in Kentucky's leading industry. In fact, a decision to legislate the abolition of such agreements (similar to the recent abolition of dual agency) is more compatible with this policy initiative and is a tact that should be undertaken after consultation

¹⁴⁰ *Mizen Arabians v. Pyramid Soc'y*, 821 F.2d 357, 360 (6th Cir. 1987).

¹⁴¹ *Miller, America Singing*, *supra* note 10, at 819.

¹⁴² *Marsh v. Gentry*, 642 S.W.2d 574, 577 (Ky. 1982) (Palmore, J., concurring).

¹⁴³ *See* KY. REV. STAT. ANN. § 230.357(3) (2007).

¹⁴⁴ *See* Ray Paulick, *Kentucky Bill Would Require Ownership, Medical Disclosures at Sales*, THE BLOOD–HORSE, Feb. 8, 2007, available at http://news.bloodhorse.com/index_prt.asp; Ryan Conley, *Revived Task Force Holds Organizational Meeting*, THE BLOOD–HORSE, May 9, 2007, at 2683.

with industry decision makers. It is imperative that the industry attract new investors if it is to thrive in an increasingly competitive entertainment market—“that [is] impossible to do if the world views you as an industry without integrity.”¹⁴⁵

¹⁴⁵ Meehan, *supra* note 5 (quoting Julie Goodman, attorney for the United States Equestrian Foundation).

